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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

STEPHEN REYES, Plaintiff and Appellant, v. STATE DEPARTMENT OF HEALTH SERVICES, Defendant and Respondent.	C039036 (Super. Ct. No. 99AS04647)

Plaintiff Stephen Reyes appeals following a jury verdict in favor of defendant State Department of Health Services (the Department) in his action for wrongful termination based on retaliation. He contends the trial court wrongly excluded evidence of the Department's violations of law which would have helped to prove its stated reasons for terminating him were pretextual. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Reyes, a longtime employee of the State of California, began working for the Department as a Nurse Consultant II in 1989. At all times relevant to this action, he was employed in the Department's Primary and Rural Health Care Systems Branch (the Branch). His job involved providing medical information to the Department to be used in allocating state funds to clinics, helping to secure funding for the clinics, and monitoring the clinics' use of funds.

Reyes alleged in his complaint, filed in August 1999, that he had filed four complaints of discrimination based on race, national origin, disability, and/or "association" against his employer, the first in 1994 with the U.S. Department of Labor, the others in January 1996, August 1996, and October 1996 with the California Department of Fair Employment and Housing (DFEH), and that he was harassed and ultimately terminated in August 1998 in retaliation for these complaints. An attachment to the DFEH complaint Reyes filed in November 1998 after his termination mentioned only two of the three prior DFEH filings. Neither the complaint nor the attachment mentioned that Reyes had filed a lawsuit against the Department and his current Branch Chief under the Fair Employment and Housing Act (FEHA) on July 1, 1997, and that the Branch Chief told him in January 1998

he was disloyal to her and she would get him for it; however, he so alleged in his trial brief and sought to prove at trial.[1]

The evidence at trial showed the following:

Irvin White, Chief of the Farm Worker Rural Health Program and Reyes's immediate supervisor from August 1994 to April 1997 (except for August 1996 to March 1997, when he served as Acting Branch Chief), noted that Reyes had persistent problems with attendance and with completing critical work assignments. At least one of Reyes's colleagues in the Branch complained to White about Reyes's failure to show up for meetings. Reyes's attendance record was the worst of any employee White supervised. After oral and written counseling and placing Reyes on "attendance restriction" in February 1995 failed to change his behavior, White issued Reyes a Notice of Adverse Action in October 1996 and suspended him for 10 days. The charges in the Notice of Adverse Action included repeated absences; ongoing noncompliance with the reporting requests of his superiors, including White and Branch Chief Anna Ramirez; and numerous failures to complete assignments.

In April 1997, Charles LaRosa became Reyes's immediate supervisor. He reported to Sunni Burns, who reported in turn to Branch Chief Ramirez. Although Burns and Ramirez did not

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[1] Reyes originally pleaded causes of action for "physical" discrimination, race or national origin discrimination, and discrimination based on association, in addition to retaliation. However, the Department eliminated three causes of action by a successful motion for summary adjudication. Thus, the case went to trial only on Reyes's claim of retaliation.

routinely supervise Reyes's work, they knew of his ongoing attendance problem.

Burns saw Reyes arriving late to work (i.e., after 8:00 a.m.) "probably a couple of times a week" and never saw him on the job after 5:00 p.m.; she counseled him about this issue. She also observed that he had a pattern of taking frequent long breaks and departures from the office during the workday without advance notice to management. His colleagues "indicate[d]" to her that they often had to "pick up his slack because he was so frequently absent."

Ramirez, who was Branch Chief for most of the period from 1995 or 1996 until August 1998, knew when she obtained that position that Reyes was on attendance restriction. She reiterated that restriction in a counseling memorandum originally issued in April 1996. The memorandum stated: Reyes's work hours were 8:00 a.m. to 5:00 p.m.; he was expected to be available during normal business hours each workday to provide technical assistance to clinics; he was expected to act as a professional in terms of work products and time management; he was to seek approval before leaving the work site during the day; and all prior attendance restrictions remained in effect. In a followup memo dated May 7, 1996, Ramirez noted that supervisors had repeatedly counseled Reyes in 1995 and 1996 about these matters. The memo concludes: "This is the final notice, written or verbal, that you will receive. If your behaviour [*sic*] is not corrected, appropriate adverse action will be undertaken."

Between April 1997, when LaRosa became Reyes's supervisor, and January 1998, Reyes was absent approximately 396 hours--about one-quarter of the total work time for those months. LaRosa issued Reyes an updated attendance restriction memo in February 1998 because "[a]ssignments were not getting completed. It was disrupting the team. He was not contributing to the team. It was like not having a nurse consultant as a member of the team. And after having given a lot of discretion with regard to giving him an opportunity to prove that he could be a valuable member of the team, I decided that it was time to take some kind of action because I had given him every opportunity to show me that he could participate in the group, and he did not. He failed assignments on top of it, because part of it was that he was not able--he wasn't there to do that."

The new attendance restriction memo reiterated the existing restrictions. The memo specified in exhaustive detail what was expected of Reyes with respect to permissible absences, notice, and reporting procedures. It also notified Reyes that he could suffer adverse action if his performance did not improve; on the other hand, if his attendance improved over the next six months, the memo might be removed from his personnel file.

After Reyes received this memo his attendance did not improve, according to LaRosa. He testified to numerous absences he had documented after the memo, while noting they were merely examples--a full listing "would have been a 200-page document." These absences included excessive and unauthorized breaks and lunch hours and unauthorized lateness, showing a habit of "[not]

paying attention to me or the attendance restriction and [doing] what he wanted to do." Furthermore, they were detrimental to the operation of the unit and irked his colleagues, who resented him coming and going as he pleased.

LaRosa also testified as to Reyes's unsatisfactory job performance before and after the issuance of the February 1998 memo. LaRosa described seven assignments he had given Reyes prior to August 1998, which constituted the bulk of his workload during the time LaRosa supervised him. In each case Reyes proved unable to complete the assignment in a timely and competent manner, despite LaRosa's repeated counseling and extensive written comments. Reyes's failures had a serious impact on the Branch's programs and the state's funding mechanism for them.

1. LaRosa assigned Reyes to develop a uniform definition of the term "medical encounter" so that the Department could better advise clinics on how to report their activities. Reyes submitted multiple drafts, but all were disorganized, incomplete, and unusable.

2. LaRosa directed Reyes in September 1997 to coordinate the development of site evaluation tools for the Farm Worker and Rural Health programs. As of April 1998, he had not completed this assignment; in fact, he never did. He did not coordinate his efforts with the analytic staff as he had been instructed to do, he did not review or analyze the prior evaluation tool, he did not apply the proper criteria to the different community clinics, and he engaged in plagiarism.

3. In October 1997, LaRosa assigned Reyes to review 13 grants for compliance with state guidelines. The assignment was completed in January 1998, but essentially by LaRosa, not by Reyes. Because Reyes had not submitted adequate and timely work on the assignment, the Department's recovery of grant funds was delayed.

4. In early January 1998, LaRosa directed Reyes to analyze criteria used to determine the need for program grants, with the goal of finding out if the methodology for funding clinics could be improved. He never properly completed this assignment. His failure jeopardized program plans based on future funding.

5. In May 1998, LaRosa directed Reyes to develop training guidelines for clinic medical staff by mid-June. He never finished the job, although he turned in several late and poorly done drafts.

6. LaRosa directed Reyes to write up a summary of an annual meeting held in June 1998. This assignment, which did not require much professional skill, took Reyes four drafts over three weeks to complete, and even the last draft was not error-free.

7. Finally, LaRosa directed Reyes to prepare clinic guidelines for the provision of primary care, an assignment that required the professional skills of a Nurse Consultant. The guidelines he presented were confusing and unfocused, and relied significantly on plagiarized material. He never completed the assignment, despite substantial input and counseling from LaRosa.

LaRosa and Branch Chief Ramirez asked Janet Treat, a Nurse Consultant III Supervisor from a different office, to evaluate Reyes's work on this assignment. Treat found it "an incredibly inferior example of Nurse Consultant work" that would have been useless to clinics. However, LaRosa's written comments were "excellent" and should have been "very, very helpful" to Reyes.

Eventually, LaRosa, his superiors Burns and Ramirez, and Department personnel and legal staff decided a new adverse action was required. Accordingly, LaRosa drafted a "Notice of Adverse Action" terminating Reyes from his position effective August 13, 1998. When drafting this document, LaRosa was unaware that Reyes had filed charges with the DFEH. Ramirez knew that Reyes had done so, since he named her in both his 1996 DFEH complaint and his July 1997 FEHA lawsuit; however, she denied holding any animosity toward him, wishing to retaliate against him, or taking any action to do so either personally or through subordinates.

The Notice of Adverse Action states that the Department is terminating Reyes due to "inefficiency," "inexcusable neglect of duty," "insubordination," "inexcusable absence without leave," and "willful disobedience." (Capitalization omitted.) (Except for the first and fourth causes, all had been cited in Reyes's 1996 Notice of Adverse Action.) The notice breaks down Reyes's failings into "Attendance" and "Assignments," documenting each category with the evidence recounted above.

Reyes testified extensively at trial and presented other evidence on his behalf. However, for the reasons stated below, we shall not set out Reyes's evidence here.

DISCUSSION

I

Reyes's sole contention is that the trial court erred by excluding evidence of the Department's alleged violations of the federal Family Medical Leave Act (29 U.S.C. §§ 2106-2654 (FMLA)) and Fair Labor Standards Act (29 U.S.C. § 201 et seq. (FLSA)) and of California's Family Rights Act (Gov. Code, § 12945.2 (FRA)), which Reyes proffered to show that the Department's claim of inadequate attendance was pretextual. As we explain in part II, this claim lacks merit. However, at the outset, we must make two observations about flaws in Reyes's appellate briefing which are almost enough to forfeit his right to be heard on the merits.

First, Reyes ignores his obligation to set out the material evidence fully, including that which supports the judgment. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) In his statement of facts he recites very little even of the evidence in his favor, and none of the evidence against him. This is unacceptable appellate practice.

Although Reyes does not directly assert the evidence was insufficient to support the verdict, he does so by implication. To prove that the wrongful exclusion of evidence prejudiced him, he must show that if the jury had heard the excluded evidence it could not reasonably have entered a verdict for the Department

based on all the other evidence in the case. Like an overt attack on the strength of the evidence in favor of the judgment, an implied attack of this sort requires a full presentation of that evidence. Because Reyes, who has the burden of showing a miscarriage of justice, has failed to give us a proper account of the evidence, we must presume the Department's evidence was sufficient. (See Cal. Const., art. VI, § 13; *Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d 875, 881.)

Second, Reyes argues for the admissibility of his purported evidence of pretext by restating verbatim his written memorandum in support of his offer of proof in the trial court. This is also impermissible.

The verbatim restatement of arguments made below is improper on appeal. An appellant must argue his case to this court, not merely recycle his trial arguments. An appellate argument conducted solely in this manner is waived. (*Balesteri v. Holler* (1978) 87 Cal.App.3d 717, 720.)

However, so far as Reyes offers a legal argument on appeal that we can test against the record, we address it on the merits below.

II

The Department moved in limine to exclude "Evidence of Dismissed Actions and/or Alleged Misconduct not Contemplated by the [FEHA]." The Department asserted that it expected Reyes to try to "relitigate or to recharacterize his dismissed FEHA claims [i.e., the discrimination causes of action dismissed on summary adjudication] as intentional torts, or FMLA/FRA

violations, or FLSA violations." Specifically, Reyes had claimed the FMLA and the FRA entitled him to much of the time off that the Department called unauthorized absence, and the Department's attendance restrictions violated the FLSA. The Department argued this evidence was irrelevant to Reyes's only surviving claim, that of retaliation for his DFEH filings, and would be more prejudicial than probative.

Reyes's counsel argued orally that evidence the Department had violated these laws to Reyes's detriment was relevant to rebut its claim of legitimate business reasons for terminating him and to prove pretext. However, counsel did not cite any such evidence.

The trial court tentatively granted the Department's motion to exclude evidence of violations of the FMLA, the FRA, or the FLSA as irrelevant. However, the court then permitted Reyes's counsel to brief the issue. He thereupon filed the brief that he now improperly reproduces verbatim on appeal.

Reyes asserted as an "offer of proof":

In its termination notice the Department had accused him of improperly taking 380 hours off, of which 208 hours were charged against his leave balance and 172 hours were not. The first category consisted of time he had lawfully taken off under the FMLA to care for his wife, who had a serious heart condition, or for his children, who had respiratory problems. The second category consisted of partial-day absences the Department could not lawfully use against Reyes: the FLSA bars an employer from docking the salary of an employee in Reyes's status for partial-

day absences, and the Department could not lawfully fire him for conduct for which it could not lawfully penalize him under the FLSA.

After hearing argument, the trial court essentially restated its rulings.

As to family care and medical leave, the court pointed out that Reyes's complaint did not allege retaliation for exercising his rights under the FRA (Gov. Code, § 12945.2), but only for exercising his right to file a discrimination claim under the FEHA (Gov. Code, § 12940). Therefore, although Reyes could offer evidence to explain his absences, he could not argue the Department violated the FRA by calling the absences unauthorized and the jury would not be instructed on that law.

As to the FLSA, the trial court ruled that Reyes could not introduce evidence related to the 1995 attendance restriction or his 1994 Department of Labor complaint because he had waived these issues due to untimeliness and the parties' settlement of a prior lawsuit.[2] The court apparently left it open to Reyes to offer evidence of more recent events as they bore on the FLSA, but Reyes fails to show that he made any further offer of proof on this subject.

Assuming Reyes's claim that these rulings were erroneous is cognizable, we reject it for the following reasons.

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[2] The record does not shed any further light on Reyes's prior lawsuit or its settlement.

First, as the Department points out, Reyes did not make a proper offer of proof. Under Evidence Code section 354, subdivision (a), an offer of proof must make known to the trial court "[t]he substance, purpose, and relevance of the . . . evidence." This requires the proponent of the evidence to set forth "the actual evidence to be produced and not merely the facts or issues to be addressed and argued." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) "The substance of evidence to be set forth in a valid offer of proof means the testimony of specific witnesses, writings, material objects, or other things presented to the senses." (*United Sav. & Loan Assn. v. Reeder Dev. Corp.* (1976) 57 Cal.App.3d 282, 293-294.) Reyes's "offer of proof" stated issues and made factual allegations, but did not reveal what "actual evidence" (*People v. Schmies, supra*, 44 Cal.App.4th at p. 53) he intended to proffer that would support his theory of relevance.[3]

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[3] Reyes's brief below cites two exhibits, which it calls "documents prepared by [d]efendants themselves that confirm" his status as an employee who "could not be ordered to average 8 hours a day." It then asserts: "In 1998, the FLSA did not allow this employer to charge any salary dock penalty for partial absences. The defendant knew this. It is clear that firing [p]laintiff for a matter for which he could not be penalized is unlawful and can never be a legitimate reason."

This is an insufficient offer of proof. Even if these exhibits established that Reyes could not "be ordered to average 8 hours a day" or be docked for partial-day absences, nothing relevant to the case follows from that point. The Department could still reasonably determine that such absences, if they harmed Reyes's job performance and persisted after repeated counseling, justified an adverse action.

Second, Reyes failed to cite any clearly relevant authority. Lacking such authority, his offer of proof failed to show grounds for admitting evidence as to the FMLA, the FRA, or the FLSA.

As to the FMLA, Reyes cited *Bauer v. Varity Dayton-Walther Corp.* (6th Dist. 1997) 118 F.3d 1109 for the proposition that his wife's medical condition fell within the Act. That point was irrelevant, however, unless he could also show, among other things, that he had given his employer the notice and documentation required by the Act for any claim of entitlement to leave. (See, e.g., 29 U.S.C. §§ 2612(e), 2613.) His offer of proof did not attempt to do so.

As to the FRA, Reyes cited no authority other than the statute itself. (Gov. Code, § 12945.2.) He asserted correctly that the statute makes it unlawful for an employer to refuse to grant a proper request for leave thereunder. (Gov. Code, § 12945.2, subd. (a).) However, as the trial court stated, Reyes did not plead in his complaint that the Department retaliated against him for trying to exercise his rights under the FRA. Though his complaint included an allegation that he had been unfairly restricted in his attendance for "taking family sickness . . . [w]hile other family employees were allowed to utilize their family sick leave," his retaliation cause of action did not mention this theory. It pleaded that the Department retaliated against him only for protected conduct "in violation of . . . Government Code Section 12940." Thus he

failed to show the relevance of any alleged violation of the FRA to his retaliation claim.

As to the FLSA, Reyes cited no authority showing that any evidence of purported violations by the Department would be relevant to his claim. *Alden v. Maine* (1999) 527 U.S. 706 [144 L.Ed.2d 636], the only case he cited, actually holds that nonconsenting states are immune from private suits under the FLSA in their own courts. (*Id.* at p. 712 [144 L.Ed. 2d at p. 652].) He asserted that this did not matter because he wanted to adduce the purported violations to prove pretext, not to state a case under the FLSA. However, his offer of proof failed to explain how any violation of the FLSA, even if proved, would help to establish pretext.

Reyes's claim of prejudicial error fails, first, because he has not shown any unlawful reason for his discharge. As we have shown, his offer of proof did not remotely make an evidentiary case relevant to showing pretext.

But even assuming the challenged evidence should have been admitted, Reyes has not carried his burden of showing the exclusion of the evidence was prejudicial.

Article VI section 13 of the California Constitution provides: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, *including the evidence*, the court shall be of the

opinion that the error complained of has resulted in a miscarriage of justice." (Italics added.)

"Anyone who seeks on appeal to predicate a reversal of [judgment] on error must show that it was prejudicial. [Citation.]" (*People v. Archerd* (1970) 3 Cal.3d 615, 643.)

Here, as we have mentioned, Reyes has not described the evidence adduced at trial against him and has not carried his burden of showing prejudice from the exclusion of the contested evidence.

DISPOSITION

The judgment is affirmed. The Department shall receive its costs on appeal.

SIMS, Acting P.J.

We concur:

RAYE, J.

HULL, J.